

Study Guide for the Procedural Approach

Objectives of this Module

1. Describe the basis for the procedural approach
2. Describe the procedural approach
3. Explain the possible positive and negative consequences associated with this approach

Introduction

The purposes of the Endangered Species Act (ESA) include:

“...to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species...”

To understand the purposes of the ESA, it is important to look at Congress’ findings which prompted the legislation. The findings of the ESA include:

“... that (1) various species of fish, wildlife, and plants have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation; (2) other species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction...” [emphasis added]

Based on these findings, Congress acted to ensure that the Federal government carefully considered the effects of its actions on ecosystems and the listed species dependent upon them and, further, that the government took steps to actively recover these species and protect their habitats.

Remembering these findings and purposes is essential to the work we do every day in section 7. Similarly, remembering the requirements and definitions of the statute and regulations is essential to ensuring that we do our work correctly.

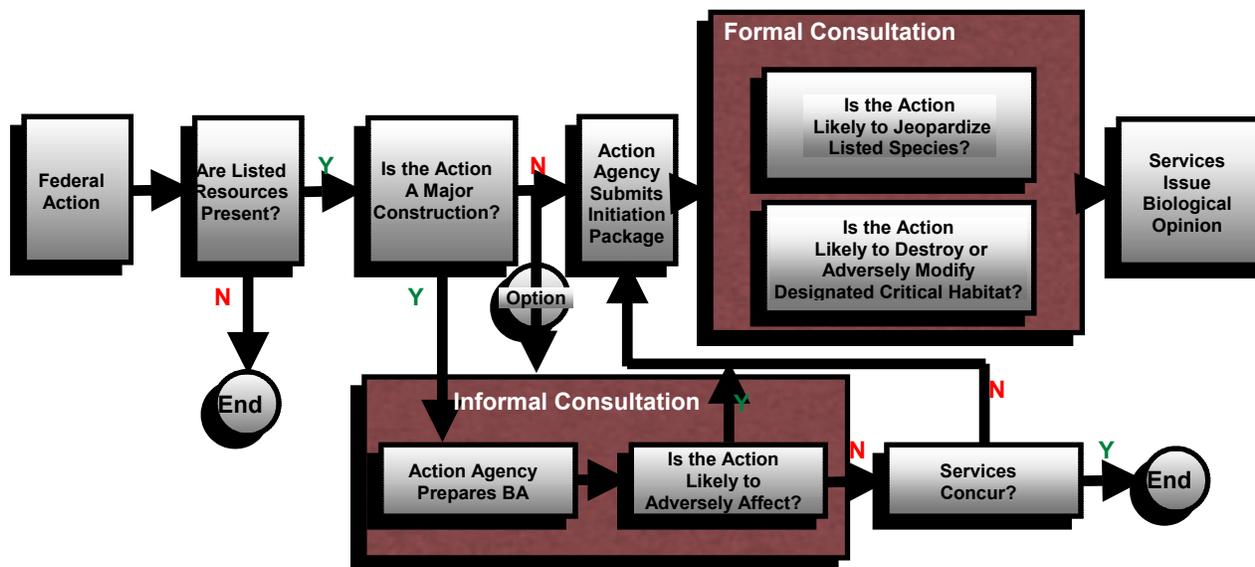
While many of us cannot stand up and recite the statute and regulations verbatim without peeking, it is crucially important that we are familiar enough with the contents of the statute, regulations (and its preamble), and the Handbook, that we can easily turn to those pertinent sections when a detail slips our mind or we are challenged on a certain point. Certainly we must know these documents well enough to correctly apply the process to our goal of conserving ecosystems and the species that depend upon them. Further, it is vitally important that we are familiar with (or can at least easily find and review) the guiding statutes and regulations under which our partner agencies operate.

All of these regulations and definitions form the outlines of the procedures we must follow to ensure compliance with the requirements of section 7 of the ESA. This outline is the basis for the procedural approach we have used for decades to engage in consultation and prepare biological opinions.

The procedural approach is essentially the steps we follow almost everyday. They originate in the statute and regulations that implement section 7(a)(2) consultation. For example, the consultation regulations at

50 CFR 402.14 describe the information required to initiate consultation and the subsequent timelines, roles and responsibilities of the participants. The Administrative Procedures Act (APA) also governs the decisions we make and the procedures we follow. In particular, under the APA our decisions are found to be “arbitrary and capricious” if we fail to consider an important aspect of the problem, consider factors that Congress did not intend us to consider, provide an explanation for our conclusion that runs counter to the evidence before us, or fail to articulate a satisfactory explanation for our conclusion.

The following flowchart describes the generalized consultation approach we follow. The boxes describe each step following the procedures outlined in the consultation regulations.



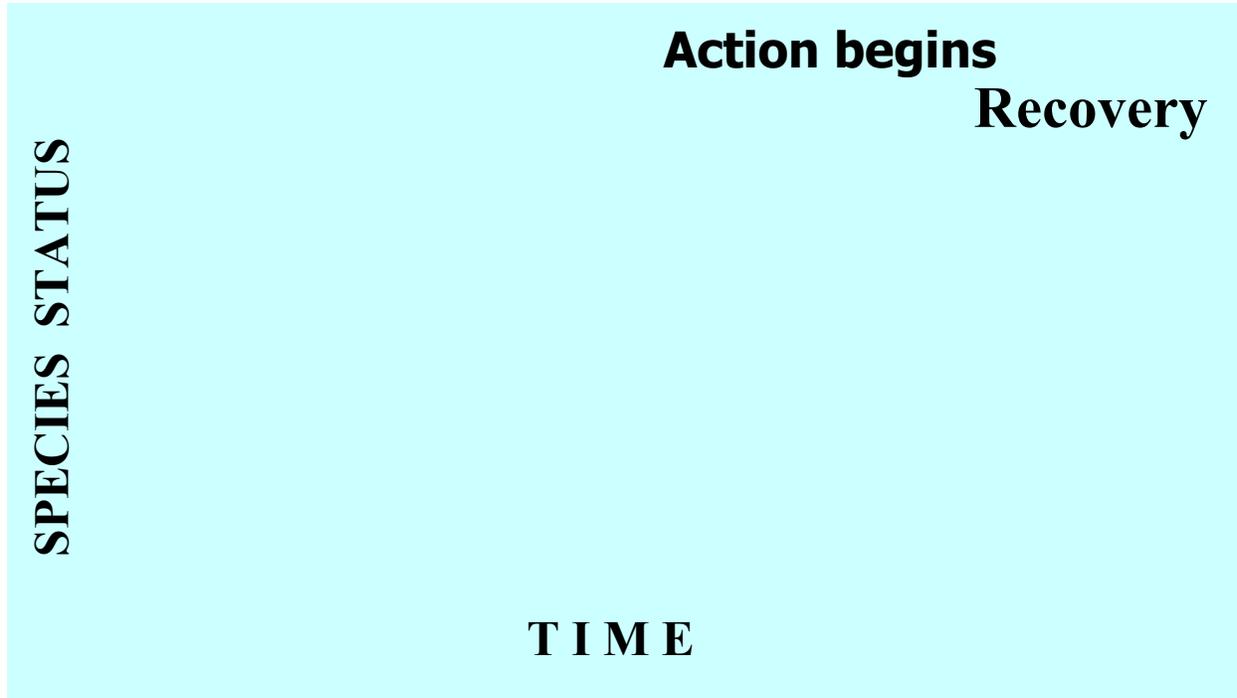
In typical consultations, the action agency takes a passive role after they submit the information required for consultation (complete package or not). After this submission, the consulting biologist takes the information and prepares a biological opinion. The result of this typical approach is that our analytical process is conducted inside of a black box. Within this black box, consulting biologists grapple with conducting the analysis and outside of the box, action agencies and applicants (and other interested parties) grapple with understanding what happened inside the box.

There are positive aspects to following the procedural approach. First, and most obvious, is that by close adherence to procedure and associated documentation we can defend our consultations and opinions against claims that we failed to abide by required procedure. In addition, because the procedures have been established in statute and regulations for decades, most participants know the steps.

However, when strictly following the procedural approach, our consultations and the resulting biological opinions tend to be opaque to the recipients. Our records and the decision-making process they should support are not understandable, lending credence to claims that our decisions are arbitrary and capricious.

One of the most serious consequences of utilizing a strictly procedural approach is that our emphasis is placed on the end result: the biological opinion. The consultation itself becomes a part of the black box and action agency and applicant participation is minimal or nonexistent. However, the purpose of the consultation is to allow for a specific period during which the action agency and consulting agency can communicate and cooperate on the use of the best available information and the analysis we will undertake. The strict procedural approach treats consultations and the resulting biological opinions as a writing process as opposed to an analytical process.

But, how do we respond when someone asks: *How did you come to that conclusion? What analysis or model or magic did you use?* Generally our answers to these questions repeat the steps laid out in statute and regulation. If we are feeling really creative, we might draw the standard chart showing the declining trend of the species and the possible changes in this trend due to the proposed action:



Unfortunately, the chart and recitation of the regulations doesn't really answer the question and the questioner is left still confused and often frustrated. For instance, explaining that we added the effects of the proposed action (and any interrelated or interdependent actions) to the environmental baseline and then took that sum together with cumulative effects to determine if the Federal action was likely to jeopardize the listed species only reiterates the regulations. The statement does not describe the analysis we conducted to determine if the effects of the action resulted in an appreciable reduction in the likelihood of survival and recovery of a species. The declining trend graph illustrated above would seem to get at the issue of a measurable, detectable, perceptible reduction in a species' likelihood of survival and recovery except that the graph: (a) is generally unquantified – meant for conceptual purposes only and doesn't reflect an actual analysis, and (b) contains a unit of measurement that does not relate directly to the jeopardy standard of section 7 – that is, the graph's axes measure the species "status" over "time" instead of a species' "likelihood of survival and recovery" (often referred to as "probability or persistence" or the inverse of "probability of extinction) over "time".

The intent of this course is to discuss the consultation process and opinion assembly process and teach you a method of analysis discovered through trial and error that will provide both meaning and substance to the analyses we conduct as part of the consultation. Our primary focus is to break the current cycle of "consultation by assembly" where the consulting biologists receive information from action agencies and then churn out a biological opinion. Instead, we propose consultations as they were originally intended: a period of discussion between the parties that culminated in the assembly of a biological opinion that documented the results of the consultation. The analytical method we will be discussing provides the framework for working with action agencies and applicant to conduct effective consultations including analyses of the risks posed to species and critical habitat by proposed actions.